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ORIGINAL

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To:
Registry EFTA Court
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Written Observations of the Government of the Netherlands

submitted in accordance with Article 20 of the Statute of the EFTA Court, in the case of

E-1-/21,

ISTM International Shipping & Trucking Management GmbH

v

AHV-IV-FAK (Liechtenstein)

The Government of the Netherlands, represented by Mielle Bulterman and Jurian Langer, head and staff member, respectively, of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, has the honour to bring the following observations to the Court's attention in this case.

I. Introduction

1. By decision of 25 March 2021 the First Chamber of the Liechtenstein *Fürstliches Obergericht* (Princely Court of Appeal, hereafter: "the referring court") requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice regarding the interpretation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1–123) (hereafter: "Regulation 883/2004") and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereafter: "Regulation 987/2009").

2. The questions were raised in a dispute between ISTM International Shipping & Trucking Management GmbH (hereafter: "ISTM") and the relevant Liechtenstein authorities regarding the application of Liechtenstein social security law to the employees of ISTM.

3. ISTM is a management company for inland waterway transport on the river Rhine, and is registered in Liechtenstein. The employees involved are residents of Germany, the Netherlands and the Czech Republic and are working full-time for ISTM in two or more EEA States, in particular, in Germany, the Netherlands, Belgium, Luxembourg and France but not in Liechtenstein. According to the referring court, the employees residing in Germany and the Netherlands also work in their respective state of residence, however not a substantial part and in no case more than 25%.

4. By order of 17 February 2017, the Liechtenstein authorities determined that Liechtenstein law is not applicable to the employees of ISTM, since ISTM did not carry out the essential decisions and functions of its business operations at its registered office in Liechtenstein.

5. In its appeal, ISTM essentially claims that having its registered office in Liechtenstein already suffices. ISTM also states that it relied on a provisional determination made by the

Czech authorities that Liechtenstein legislation is the applicable legislation. This provisional determination has become definitive as the two-month period to challenge this termination has expired.

6. Against this background, the referring court asks the EFTA Court a number of questions. For further information regarding the facts of and legal background to the proceedings, the Government of the Netherlands refers to the request for an advisory opinion.

II. The questions referred

Part I

Questions 1 and 2

7. The Government of the Netherlands will answer these questions together.

8. The questions concern the interpretation of Article 13(1) of Regulation 883/2004 and Article 14(5a) of Regulation 987/2009. With these questions, the referring court essentially seeks clarification as to whether a mere registered office of an undertaking suffices to constitute the connecting factor for subjecting persons to the legislation of an EEA State, and if that is not the case, what criteria determine where the essential decisions of the undertaking are adopted and the functions of its central administration are carried out.

9. In reaction to these questions, the Government of the Netherlands submits the following remarks.

10. According to Article 13(1) of Regulation 883/2004, a person who normally pursues an activity as an employed person in two or more EEA States is subject to the legislation of the EEA State in which '*the registered office or place of business*' of the undertaking or employer is situated if the person is employed by one undertaking or employer and does not pursue a substantial part of his/her activity in that EEA state of residence.

11. Article 14(5a) of Regulation 987/2009 defines '*registered office or place of business*' as the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.

12. Even though the German language version of Article 14(5a) of Regulation 987/2009 seems to imply that a mere registered office may suffice, the Government of the Netherlands submits that the English and French language versions unequivocally state that the registered office is <u>where</u> the essential decisions of the undertaking are adopted and the functions of its central administration are carried out. The same is true for the Dutch language version ("*waar*"). These language versions therefore imply that a mere registered office does not suffice.

13. This interpretation is also confirmed in the case law of the CJEU. In this regard reference is made to the judgment of 28 June 2007 in case Planzer (C-73/06, EU:C:2007:397). Although this case relates to taxation, the legal issue addressed in that case is similar to the case at hand. Both cases concern the determination of a company's place of business.

14. In paragraph 61 of the judgment in case Planzer, the CJEU states as follows:

"*Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account.*"

15. From this paragraph, it is obvious that a mere registered office does not suffice but all relevant factors should be taken into consideration when determining the place of business.

16. Likewise, the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland of December 2013 (hereafter: "the Practical Guide") clarifies that determination of a company's place of business requires a series of factors to be taken into consideration in line with paragraph 61 of the judgment in Planzer (see pages 35-36 of the Practical Guide).

17. In addition, it is emphasised that not taking into account the objective situation but solely formal considerations, like a mere registration in an EEA State, would amount to allowing undertakings to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules (see the CJEU judgments of 16 July 2020, AFMB, C-610/18, EU:C:2020:565 paragraph 66, 67 and 69 and of 3 June 2021, Team Power Europe, C-784/19, EU:C:2021:427, paragraph 64). In the view of the Government of the Netherlands, this adverse effect must be prevented.

18. In sum, the Government of the Netherlands concludes that a mere registered office does not suffice and that all the above mentioned factors (see paragraph 14) need to be taken into account. It is for the referring court to investigate and decide whether a company like ISTM adopts its essential decisions and carries out its central administration in Liechtenstein.

Part II

Question 1

19. In the present case, ISTM is registered in Liechtenstein, but its employees did not work in that EEA State during the relevant period. The Czech authorities had provisionally determined that Liechtenstein legislation was applicable, but did not inform the Liechtenstein authorities of its provisional determination. Given these facts, the referring court essentially seeks clarification as to whether and how the Liechtenstein authorities should (also) have been informed about this provisional determination.

20. In reaction to this question, the Government of the Netherlands submits the following remarks.

21. Article 16 of Regulation 987/2009 applies when a person pursues an activity as an employed person in two or more EEA States. It establishes the procedure that requires the EEA State of residence of such a person to inform other EEA States.

22. According to Article 16(2) of Regulation 987/2009, the designated institution of the place of residence must without delay provisionally determine the legislation applicable to the person concerned. It must also inform the designated institutions of each EEA State in which an activity is pursued of this provisional determination.

23. According to Article 16(3) of Regulation 987/2009, the provisional determination becomes definitive within two months after the moment the institutions designated by the competent authorities of the EEA States concerned, have been informed.

24. As to how designated institutions are to be informed, the Government of the Netherlands stresses that one should not rely on the employer and employees involved. This would make the way by which the information is sent and the timing thereof subject to the interests of the employees and employer. The Government of the Netherlands is therefore of the opinion that a separate formal communication has to be sent to these institutions in the other EEA States involved.

25. As to whether the Liechtenstein authorities should have been informed, it is noted that a literal reading of Article 16(2) of Regulation 987/2009 suggests that there was no need to inform these authorities of the provisional determination.

26. However, the Government of the Netherlands is of the opinion that given the purpose of Article 16 of Regulation 987/2009 the Liechtenstein authorities should also haven been informed of this determination.

27. The purpose of this procedure is to guarantee that the applicable legislation is correctly determined on the basis of the facts in a specific case taking into account all elements (see, for instance, opinion of 21 May 2015 of Advocate-General Bot in Case C-189/14, Chain, EU:C:2015:345, in particular paragraph 75).

28. In order to achieve this purpose, it is essential that all relevant EEA States are informed of the provisional determination in case that a person pursues an activity as an employed person in two or more EEA States. This means not only that the EEA states where a person works should be informed but also the EEA state where his/her employer has its registered office or its place of business is located.

29. This is also the view articulated in the Practical Guide (page 37):

"*The institution in the place of residence must then inform the designated institutions in each of the Member States in which an activity is pursued and where the employer's registered office or place of business is located of its determination using appropriate SEDs.*"

30. Any other interpretation of the procedure of Article 16 of Regulation 987/2009 would result in the situation that Liechtenstein legislation would be the applicable legislation even though the Liechtenstein authorities were never informed about the provisional determination and the designated institution of the place of residence may have misunderstood the facts. This would be a very unwelcome outcome and in contradiction with the purpose of the applicable rules.

31. Moreover and for the sake of completeness, the Government of the Netherlands considers that a provisional determination has not become definite when the institution responsible for the applicable legislation was not informed. This institution can therefore challenge this decision when it becomes aware of the determination. This should especially be possible in the situation that the EEA State involved was not informed of the provisional decision due

to the fact that the person involved does not work in that EEA State, but only his employer appears to be established in this EEA State.

Questions 2 and 3

32. The Government of the Netherlands will answer these questions together.

33. With these questions, the referring court essentially seeks clarification as to whether a definitive determination as stipulated in article 16(3) of Regulation 987/2009 can be challenged by the designated institution of an EEA State after the period of two months has expired and, if so, what the legal consequences of such a challenge are.

34. The starting point for the Government of the Netherlands is that an A1 certificate issued on such a definitive determination is in principle legally binding.

35. When confronted with an A1-certificate, other authorities cannot unilaterally modify this outcome as this would undermine the functioning of the coordination system. In this regard reference is made to the judgment of 6 September 2018 in Case C-527/16, Alpenrind (EU:C:2018:669, paragraph 46):

"*If it were to be accepted that, apart from cases of fraud or abuse of rights, the competent national institution could, by bringing proceedings before a court of the host Member State of the worker concerned to which that institution belongs, have an A1 certificate declared invalid, there would be a risk that the system based on sincere cooperation between the competent institutions of the Member States would be undermined (see, to that effect, as regards E 101 certificates, judgments of 26 January 2006, Herbosch Kiere, C-2/05, EU:C:2006:69, paragraph 30; of 27 April 2017, A-Rosa Flusschiff, C-620/15, EU:C:2017:309, paragraph 47; and of 6 February 2018, Altun and Others, C-359/16, EU:C:2018:63, paragraphs 54, 55, 60 and 61).*"

36. However, in the case at hand there is no indication that A1 certificates have been issued given that the Czech authorities are of the opinion that Liechtenstein legislation is applicable, while the Liechtenstein authorities are of the opinion that this is not the case.

37. In the view of the Government of the Netherlands, the Liechtenstein authorities can challenge a final determination once the two months period has expired on the basis of Article 5 of Regulation 987/2009.

38. According to this provision, an institution of the Member State may ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of a document where there is doubt about the validity of that document or the accuracy of the facts on which the particulars contained therein are based.

39. Following the principle of sincere cooperation underlying the coordination system and taking into account Article 76 of Regulation 883/2004, this should especially be possible when the applicability of the legislation of another EEA State is determined without proper research into the relevant facts and circumstances occurring in the other EEA States involved and in particular the EEA State whose legislation may be determined as applicable.

40. In this context, the authorities may rely on Decision No A1 of the Administrative Commission of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents to exchange information.

41. The Liechtenstein authorities could on this basis ask the Czech institution to review and, where necessary, clarify its decision by means of providing their findings of the relevant facts and circumstances. Where appropriate, the Czech institution should withdraw or declare the relevant document invalid.

42. It follows from the principle of sincere cooperation that any institution of an EEA State must carry out a diligent examination of the application of its own social security system. It also follows from that principle that the institutions of the other EEA States are entitled to expect

the institution of the EEA State concerned to fulfil that obligation (see the CJEU judgment of 6 February 2018, Altun, C-359/16, EU:C:2018:63, paragraph 42).

43. The Government of the Netherlands is moreover of the opinion that procedural rules should not stand in the way of the correct application of title II of Regulation 883/2004. According to the CJEU's case law, this principle applies in the case of individuals (see judgment of 14 October 2010, Van Delft, C-345/09, EU:C:2010:610, paragraph 52) and employers (see judgment AFMB, cited above, paragraphs 66 and 67). There is no reason that this principle should not equally apply to the institutions that apply Regulation 883/2004.

44. Therefore, the Government of the Netherlands is of the opinion that an institution cannot be obliged to issue an A1 certificate if that institution is of the opinion that the application of its legislation would violate the conflict rules contained in title II of Regulation 883/2004. Where a refusal to issue an A1 certificate causes a difference of opinion between EEA States, Article 5 of Regulation 987/2009 applies and may provide for a solution.

45. As to the legal consequences, the Government of the Netherlands notes that a successful challenge by the designated Liechtenstein institution has retroactive effect in the sense that Liechtenstein legislation was never the applicable legislation.

46. Depending of the facts in the main proceedings, this could mean that the Liechtenstein institutions have incorrectly levied social security contributions and paid out social benefits. In that event, ISTM or its employees may be entitled to reclaim the unduly paid contributions. Also a settlement in conformity with Article 84(1) of Regulation 883/2004 and chapter 3 of title 4 of Regulation 987/2009 is possible.

III. Conclusion

47. For the reasons set out above, the Government of the Netherlands proposes the following answers to the questions of the referring court:

Part I

Questions 1 and 2:

"A mere registered office does not suffice but all circumstances of the case should be taken into consideration when determining the place of business."

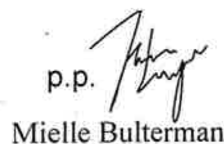
Part II

Question 1:

"The institution in the place of residence shall inform the designated institutions in each of the EEA States in which an activity is pursued and the designated institution in the EEA State where the employer's registered office or place of business is located of its provisional determination."

Question 2 and 3:

"A final determination can be challenged on the basis of Article 5 of Regulation 987/2009."

p.p. 
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Agents for the Government of the Netherlands

The Hague, 22 June 2021